Supreme Court, U.S.
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No. 01-641

In The

Supreme Court of the United States

ARA HISTED,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent E.I. du Pont de Nemours and Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner, Ara Histed, ["Petitioner" or "Histed"] originally brought this action in 1998 in the United States District Court for the District of Delaware as an age and sex-based failure to promote case. Petitioner also claimed that she was not paid in a manner equal to similarly situated male employees. The case was tried to a jury, which completely exonerated DuPont. In the course of instructing the jury, the district court clearly stated that Histed could prove pretext either by "throwing doubt" on DuPont's explanation for its personnel action, or by using an alternative route of pointing to evidence that discrimination was the more likely cause for her not being promoted. [Pet. 6].

The United States Court of Appeals for the Third Circuit affirmed the judgment in all respects. [App. 1a-11a]. In doing so, the court of appeals properly noted that a jury in an employment case tried under the pretext formula must reject the employer's proffered reasons in order to find that the real reason for the employment action was discrimination. [App. 4a]. The court of appeals denied a Petition for Rehearing and Rehearing En Banc on July 16, 2001. [App. 14a]. This Petition followed.

REASONS WHY PETITION SHOULD BE DENIED

1. Petitioner attempts to construct a split of opinion among the circuits as the sole basis for a need for this Court to review the decision below. Petitioner argues that some circuits require a plaintiff to attack the "credibility" of the employer's proffer of a non-discriminatory reason

for the employment action while others do not. [Pet. 8-9]. Petitioner's construct of a conflict among the circuits is illusory.

As Petitioner properly concedes [Pet. 8-9], there is no material difference in the approaches of the Third, Sixth, Eighth, and Tenth Circuits to the process of establishing pretext in a case, such as the instant one, that is tried under the template of the shifting burdens of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

The Seventh Circuit, especially since this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 132, 120 S.Ct. 2097 (2000), clearly follows the proposition that a plaintiff needs to "squarely rebut" the employer's articulated reason for the employment decision under review. *Clay v. Holy Cross Hospital*, 253 F.3d 1000, 1007 (7th Cir. 2001). This approach is firmly aligned with this Court's most recent guidance in this type of case that the plaintiff must ultimately show that the employer's reasons are unworthy of credence and were a mere pretext for discrimination. *Reeves*, 530 U.S. at 143, 120 S.Ct. at 2106. Indeed, the Seventh Circuit continues to adhere to the formula that evidence of pretext may fall into the categories which prove the employer's proffered reasons are factually baseless, were not the actual motivation, or were otherwise insufficient to motivate the action involved in the individual case. *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 888 (7th Cir. 2001). Thus, no real, deep, or abiding conflict exists among the circuits.[1]

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[1] To the extent Petitioner intimates that the instant decision creates an internal conflict within the Third Circuit [Pet. 9], it

2. In an attempt to squarely cast this case on one side of Petitioner's perceived split among the circuits, Petitioner focuses on the jury charge and comments made by the district court, and the affirmance of these actions by the Third Circuit panel. [Pet. 3-7]. Petitioner attempts to show that the jury charge and comments by the district court reveal the "narrow focus" of pretext law of the district court and the Third Circuit panel. [Pet. 5, 7].

Petitioner complains that the district court "refused" to give examples of different types of inferential evidence in its charge because of its "narrow focus." [Pet. 5, 6]. However, the district court specifically encouraged Petitioner to argue such examples in closing argument, which Petitioner's counsel did, in fact, do. [App. 7a]. Moreover, the district court's "either/or" charge conforms to the position that Petitioner takes in her Petition [Pet. 1, 6], and is consistent with guidance from this Court. *Reeves*, 530 U.S. at 143, 170 S.Ct. at 2106. Consequently, Petitioner's real concern lies with the evidentiary rulings of the district court.

Petitioner's evidentiary complaints center around comments made by the district court during a trial conference. [Pet. 4-5]. Petitioner suggests that these comments reveal that the district court's view of the scope of relevance was too narrow. [Pet. 3-4, 5]. Contrary to Petitioner's assertions, the district court's rulings were not based on the "narrow focus" of "employer veracity *vel*

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was resolved in rejection of her unsuccessful petition for *en banc* review and is otherwise unworthy of plenary review by this Court.

non." [Pet. 1, 5]. Rather, the rulings were merely based on the Federal Rules of Evidence.

During one of its initial rulings on evidence, the district court stated that it would not keep any evidence out as long as the party could develop an argument about how the evidence was relevant. [App. 3a]. Further comments by the district court reveal that its rulings were in accord with the Federal Rules of Evidence. In fact, the district court recited *verbatim* the text of F.R.E. 401 in its comments, and cautioned Histed that she misconstrued the term relevance to mean that " '[e]verything is relevant.' " [App. 3a; Pet. 4]. As stated by both the court of appeals and the district court, "Histed's [view of the scope of relevance] is simply too broad." [App. 3a]. It is this broad view of the scope of relevance that now causes Petitioner to complain.

More specifically, Petitioner lists her alleged "proof of bias" that she claims was improperly excluded by the district court because of its "narrow focus." [Pet. 5]. However, a review of the evidentiary rulings shows that these pieces of evidence were not excluded based on some misperceived "narrow focus" of the district court "about how to prove discrimination," as stated by Petitioner. [Pet. 5]. Rather, these pieces of evidence were excluded because they simply were inadmissible under the Federal Rules of Evidence.

For example, the "evidence that the promotions committee willingly chose not to look at . . . which put Histed in her best light" were Petitioner's comment cards. [Pet. 5; App. 4a]. These comment cards were found by the

district court to be inadmissible because they were hearsay, not falling under the business records exception, and were irrelevant because the promotions committee did not use the cards when it made its decisions. [App. 4a-5a]. In fact, Petitioner's counsel has conceded that the comment cards were hearsay. [App. 5a].

In addition, Petitioner's allegation that her "new supervisor as of the time of trial was trying to get her promoted and was mystified that he could not accomplish it" [Pet. 5], related to her failure to be promoted in 1999. However, Petitioner's Complaint clearly spelled out that her case was failure to promote in 1995 and 1996. [*See* Pet. 3; App. 5a]. She only revealed this new evidence and new allegation of failure to promote in 1999 a week before trial at a pre-trial conference. [App. 5a]. The district court gave Petitioner every opportunity to articulate a theory as to why this evidence was relevant, and then properly determined that it was not relevant to mitigation of damages, to state of mind, to pretext, or as evidence of a failure to remedy, or as an admission. [App. 5a]. Thus, the district court properly excluded this evidence under the Federal Rules of Evidence. [App. 5a].

Moreover, Petitioner's allegation that "one manager told Histed he 'had goofed . . . it shouldn't have been' " was also properly excluded. [Pet. 5]. Petitioner never referenced a record citation for this comment during briefing below. [App. 5a]. The only reference found in the record was during direct examination of Petitioner when she was asked what a Mr. Montovino had said about the way the 1995 promotions had been handled and she responded, " 'He said he had goofed.' " [App. 5a]. This testimony was objected to as hearsay, and the objection

was sustained by the district court. [App. 5a]. Thus, the comment was properly excluded as hearsay under the Federal Rules of Evidence. [App. 5a].

As such, the examples of evidence that Petitioner lists as "proof of bias" were simply inadmissible under the Federal Rules of Evidence. These are very ordinary evidentiary rulings, completely reviewed by the court of appeals, and unworthy of further review by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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